Supreme Court, U.S.
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No. 97-972

In The

Supreme Court of the United States

October Term, 1997

PAUL A. DUKE, Individually and As Trustee for TERRI L. STRICKLAND, JEAN F. DUKE, PAUL A. DUKE, JR., C. HUNTER TISON, LAURA D. TISON, RUTH STRICKLAND, HERB STRICKLAND, JON A. PIRTLE, RONALD G. GREEN and MATTHEW H. PATTON,

Petitioners,

vs.

MARSHALL & CO., INC., KENTWOOD BRETT THACKSTON, MARSHALL & CO. SECURITIES, INC. and MICHAEL P. MARSHALL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents do not agree that this case presents the questions identified by the Petitioners. The case presents the following questions:

1. Did the Court of Appeals and the District Court properly conclude that the arbitrators did not exceed their powers, pursuant to 9 U.S.C. § 10(a)(4), when they awarded Respondents attorney's fees as had been requested in the pleadings and stipulated to the arbitration panel as an issue they should decide?

2. Did the Court of Appeals and the District Court properly conclude that the arbitrators did not act arbitrarily or capriciously in awarding the Respondents attorney's fees based on an extensive record which included briefs from all parties specifically addressing the issue of attorney's fees?

3. Did the Court of Appeals and the District Court properly conclude that the arbitrators were not guilty of "misconduct", pursuant to 9 U.S.C. § 10(a)(3), when they denied the last of Petitioners' requests for adjournment of a scheduled session after granting them numerous prior adjournments and giving them alternative opportunities to submit additional evidence?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petitioner has correctly identified the parties before the Eleventh Circuit. Pursuant to Rule 29.6 of the Rules of this Court, the Respondents submit the following list of all parent companies and nonwholly owned subsidiaries of the corporate Respondents:

Respondent Marshall & Co., Inc.

Parent: None

Subsidiaries: None

Respondent Marshall & Co. Securities, Inc.

Parent: None

Subsidiaries: None

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STATUTES AND REGULATIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* is involved in this case and in particular, 9 U.S.C. § 10, as cited by petitioners.

STATEMENT OF THE CASE

The Respondents do not agree that the Petitioners' Statement of Claim is sufficient to outline the questions presented for review. The Respondents, therefore, provide the following statement:

A. Procedural History

This matter originates from a consolidated arbitration proceeding before a three-member panel of arbitrators from the National Association of Securities Dealers ("NASD"). The arbitration began on February 13, 1992 and ended on December 23, 1994, with an award in favor of Respondents.

After 58 arbitration sessions Petitioners' case was closed, and the arbitration panel ("Panel") granted Respondents' motion to dismiss the claims in an Interim Award dated August 9, 1994. At the Panel's direction, the parties then submitted briefs on the question of attorney's fees. On December 23, 1994, the arbitrators issued a Final Award affirming their earlier decision to dismiss and awarding Respondents attorney's fees and costs. (Appendix to Petition, p. 9a).

Shortly thereafter, Respondents filed a Petition to Confirm Arbitration Award in United States District Court for the Northern District of Georgia, and Petitioners answered and cross-moved to vacate. On July 26, 1995, the district court granted Respondents' petition to confirm and denied Petitioners' motion to vacate. After considering motions to alter or amend the judgment filed by both parties (Respondents' motion sought to add pre-judgment interest)

the court entered an amended judgment on April 1, 1996, including the pre-judgment interest.

The Petitioners appealed to the Eleventh Circuit Court of Appeals which affirmed the judgment of the District Court on June 10, 1997, and on September 11, 1997 denied the Petitioners' request for rehearing *en banc*.

B. Factual Background

1. Parties and Pre-Hearing Events

This matter arises out of the unanimous decision of three arbitrators to award Respondents a portion of the attorney's fees and expenses they incurred defending frivolous securities fraud allegations. The Panel reached its decision after a review of the evidence — including the testimony of 19 witnesses in 58 hearing sessions — and careful consideration of the law. The transcript of the proceeding alone filled over 6,000 pages. (Appendix to Petition, p. 9a).

The Petitioners in this case include Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, as Trustee for Terri L. Strickland (collectively referred to herein as "the Dukes"), members of a wealthy Atlanta family, who filed an arbitration claim (NASD Case No. 90-00460) in January 1990. Shortly thereafter, Ronald G. Green, an Atlanta entrepreneur, commenced a similar arbitration (NASD Case No. 90-00461). Approximately one year later, Matthew H. Patton, a senior litigator at a large Atlanta law firm, filed his own claim in January 1991 (NASD Case No. 91-00116). Pursuant to an agreement of the parties, the NASD consolidated the three arbitrations into a single proceeding. (R1-5, R1-1, Att. 3).[1]

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1. Citations in the form "R-__" are to the record before the Eleventh Circuit Court of Appeals.

The Respondents in the case include Marshall & Co. Securities, Inc., where Petitioners held brokerage accounts and Marshall & Co., Inc., a holding company. Brett Thackston served as Petitioners' stockbroker at Marshall Securities for many years. Michael P. Marshall was the President of Marshall Securities during the relevant time period and was also one of the firm's eleven managing directors. (R1-5, Tr. at 5321, 5326; 123, 132-35).

The Panel consisted of two attorneys, A. Keith Logue, Esq. (chairman) and James R. Giblin, Esq., and Mr. Ronald Lankford, a securities professional (R1-5, Tr. 3), arbitrators who had presided over at least 16 arbitrations. The arbitrators' authority to hear the case was based on Uniform Submission Agreements signed by Petitioners. The NASD Code of Arbitration Procedure ("NASD Code") governed the proceeding as supplemented by a "Joint Preliminary Statement and Scheduling Order" ("Joint Scheduling Order") submitted on consent by the parties. (R1-5).

2. Petitioners' Claims

Petitioners pursued three basic claims, all involving their investment in a Florida-based telecommunications company called Central Corporation ("Central"). First, they alleged that Mr. Marshall conspired with another Atlanta businessman to engineer a "sham bankruptcy" of Central in November 1988 to the detriment of hundreds of Marshall Securities' customers holding Central stock, including Petitioners. Petitioners argued Mr. Marshall's alleged actions were motivated by a secret scheme to transfer Petitioners' equity interests to himself and his associates. Second, Petitioners claimed Mr. Thackston charged them unlawful prices for Central stock. Specifically, they asserted he marked-up the price of the stock beyond the NASD's guidelines. Third, they claimed Mr. Thackston misled them about Central's financial condition, prompting their repeated purchases of the stock from 1984-1989. Petitioners asserted that, without these alleged

misrepresentations, they would have sold their stock for a sizeable profit prior to the October 1987 stock market crash. (R1-5 Tr. 35-36, 40-41, 2449-50).

After hearing Petitioners' witnesses and reviewing the exhibits, the Panel found that *nothing* supported these contentions. Mr. Marshall acquired his interest in Central in a transaction approved by the bankruptcy court. Central's Board of Directors made the decision to file bankruptcy, *not* Marshall Securities. Petitioners' equity in the company was not transferred to Mr. Marshall, it went to the company's creditors and new owners pursuant to a court-approved reorganization plan. Far from being charged too much, Petitioners received *discounts* on their commissions. Evidence offered at the hearing showed that the NASD specifically had reviewed Mr. Thackston's trades and found them to be well within acceptable markups. Finally, the evidence revealed Petitioners *knew* about Central's financial condition. Moreover, Mr. Thackston's statements about Central — many of which were recorded surreptitiously by Mr. Patton (who secretly taped over 130 telephone conversations with Mr. Thackston and other Marshall Securities employees) were completely accurate, even when evaluated with the glare of hindsight. (R1-5, Tr. 170, 649, 857, 4561, 4690, 5260 5317-5565, 5774).

3. Petitioners' Adjournment History

During the course of the arbitration, Petitioners called a total of 19 witnesses and submitted 26 volumes of exhibits. Ms. Strickland, Mr. and Mrs. Duke, Mr. and Mrs. Tison, Paul Duke, Jr., Mr. Green and Mr. Patton all testified, often for multiple sessions. From time to time, they also furnished the Panel with legal memoranda or summaries of their position. Their case occupied 58 sessions over 31 days. From beginning to end, the arbitration lasted *five* years. (R1-5).

The Panel bent over backwards to accommodate Petitioners' schedules. In total, Petitioners requested that almost 22 days of hearing be rescheduled and obtained 16½ days worth of adjournments as their case-in-chief stretched over a two-year period. Petitioners offered a laundry list of reasons for cancelling a session, including some as far-fetched as the "Blizzard of '93" (which occurred over a weekend). (R2-6, chart, p. 18-19).

Tired of the delays, the NASD asked the parties for available session dates in late 1993 and early 1994 to finish the arbitration. In a January 27, 1994 letter, Petitioners informed the NASD that they were "unfortunately" unavailable for the hearing during 115 of the 118 business days between January 27 and July 1994. Shortly thereafter, they informed the NASD that they were no longer available for the three days they previously had identified as open. Respondents presented evidence to the Panel that Petitioners were delaying the arbitration intentionally, as part of an overall plan to force a favorable settlement by waging a war of attrition. (R2-6, Vol. "Selected Correspondence")

4. The April 14-16 Dates

Following a conference call on February 23, 1994, the Panel scheduled a session for April 14-16, 1994, dates specially selected by *Petitioners*. In that call, William Sumner, one of Petitioners' counsel, agreed either to be present for these sessions or to have another attorney from his office there to present evidence. In a special Order dated March 23, 1994, the Chairman confirmed the Panel's prior direction that Petitioners "will complete their case in chief with their final witnesses whose names have been previously provided to Respondents". (R2-6).

By that time, Petitioners could identify only four more witnesses whom they might call. Prior to the April 14 session, Petitioners narrowed their witness list to just one "half-day" witness,

Stuart Lewis, a Texas resident. Petitioners failed, however, to secure Mr. Lewis for this session. In fact, Respondents' investigation revealed that Petitioners had only contacted Mr. Lewis the week before the session. *Id.*

Even though they appeared at the April sessions without a witness, the Panel informed Petitioners they could supplement the record, if they wished, with affidavits or deposition testimony from Mr. Lewis. The Panel said they would meet on April 15 and 16 if Petitioners desired to present a live witness. The Panel also set a briefing schedule for Respondents' motion to dismiss. Petitioners never objected to this schedule nor did they file a protest with the Panel — or with a court — concerning the denial of their postponement request.

5. The Award

On May 2, 1994, after Petitioners' case had ended, Respondents filed a motion to dismiss, supporting it with a lengthy memorandum of law. Petitioners responded to the motion with a 91-page brief of their own, as well as host of exhibits. On August 22, 1994, the Panel entered an "Interim Order," which granted Respondents' motion. In the Interim Award, the Panel stated it was considering awarding attorney's fees to Respondents. The Panel requested the parties to "provide statutory authority and/or case law demonstrating an arbitration panel's authority to render attorney's fees." It also asked Respondents to submit proof of their fees and expenses. (R1-5).

In response, Respondents submitted numerous affidavits, attesting to the amount and reasonableness of the fees sought. They also submitted a memorandum and reply memorandum of law discussing the Panel's authority to award attorney's fees and expenses. Petitioners opposed the motion. They, too, filed a lengthy brief, though they never submitted any affidavits or expert testimony disputing the amount or reasonableness of the fees requested. (R1-5).

On December 23, 1994, the Panel entered its Final Award. It affirmed its earlier dismissal of Petitioners' claims, and assessed $634,017.27 in attorney's fees and expenses and $64,000 in forum charges against Petitioners and in favor of Respondents. The award specifically recited the background facts and the Panel's authority to award attorneys fees and expenses. (Appendix to Petition, pp. 25a-37a).

REASONS FOR DENYING THE WRIT

The Court should deny certiorari because Petitioners' only real ground is that they are unhappy with the Panel's decision. They are simply arguing that the Panel made erroneous factual findings and misapplied the law — factors that do not justify the granting of petition for certiorari. The Petitioners' arguments to this Court are the same as those raised in the lower courts. The Petitioners are unhappy with the arbitrators' decision and they want the Court to substitute its judgment for that of the Panel. The courts below correctly rejected Petitioners' arguments, and instead applied settled case law, including decisions of this Court, that set out the standard for reviewing arbitration awards. In so doing, the District Court and the Court of Appeals properly refused to second-guess the Panel and confirmed the arbitration award.

In short, this case involves the routine review of an arbitration award; there is no issue that warrants review by this Court. For example, the Petitioners have not and cannot argue that there is a split in authority regarding the issues in this case. The law governing the review of arbitration awards is not in conflict and, in fact, recently was addressed by this Court in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). And this legal standard was applied and followed by the lower courts in confirming the award.

The only ground put forth by Petitioners to support their petition is that the arbitration process is somehow "unfair" because

the arbitrators ruled against them. However, this Court has addressed the validity of the arbitration process for hearing claims such as this one. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (holding that the arbitrators are "capable" of determining federal securities law claims and the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"). And the arguments put forth by Petitioners provide no ground for further elucidation of the Court's earlier ruling. Moreover, as the lower courts correctly found and as discussed below, the arbitration process was fair to Petitioners and the arbitrators' actions were supported by the record and facts of the case.

I.

THE COURT OF APPEALS APPLIED THE CLEAR AND PROPER STANDARD IN REVIEWING THE ARBITRATION AWARD.

No conflict exists regarding the appropriate standard to apply to the review of an arbitration award. As this Court recently noted, a court should give "considerable leeway" to an arbitrator's ruling, setting aside his or her decision only in certain narrow circumstances. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 943. Thus, a court's review of the arbitration process is "severely limited" and "the Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards. . . ." *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled on other grounds*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 948-949.

Courts hearing motions to vacate "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (citation omitted). Arbitration awards cannot be overturned merely because the reviewing court may disagree

with the arbitrator's conclusion or may believe a different decision is better. *See Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994). Judicial intervention under the FAA is so narrow that,

> [t]he statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitrators or the parties.

Robbins v. Day, 954 F.2d at 683. Given this limited review, a court must not second-guess a panel's rulings. "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993). In reviewing arbitral awards, a court is supposed to determine "whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Remmey v. PaineWebber, Inc.*, 32 F.3d at 146 (citations omitted).

Both the District Court and the Court of Appeals followed these standards in reviewing the arbitration award.

II.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE ARBITRATORS HAD THE AUTHORITY TO AWARD RESPONDENTS ATTORNEY'S FEES.

The Panel set forth three sources for its authority to award attorney's fees:

> First the parties agreed to submit the issue of attorneys' fees and expenses to the panel so that an

> enforceable "bilateral agreement" exists . . . Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American rule".

(Appendix to Petition, p. 36a) (citations omitted).

While the Panel identified its authority to award attorney's fees, it chose not to discuss its rationale for the award. Arbitrators are not required to do so. *See, e.g., Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993) ("Arbitrators need not give reasons for their determinations.")

A challenge to an arbitration award on the basis that an arbitration panel has exceeded its authority turns on whether the arbitrators had the *power* to decide an issue submitted to them. As the Court of Appeals correctly stated, "[o]nly once source of authority is necessary to affirm the decision." (Appendix to Petition, p. 4a). In reviewing an award pursuant to a Section 10(a)(4) challenge, courts examine whether there was any basis whatsoever for permitting the panel to rule, with all doubts concerning the arbitrability of an issue resolved in favor of finding the authority. *Willoughby Roofing and Supply Co. v. Kajima Int'l, Inc.*, 776 F.2d 269 (11th Cir. 1985). Further, while arbitrators should not act in a "wholesale departure from the law", they are allowed to interpret the law and the scope of their authority expansively. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[A]rbitrators do have the power to fashion equitable relief").

Significantly, although they are claiming the Panel lacked all authority to award fees, Petitioners have undercut this argument by acknowledging in their filings in the lower courts that the Panel had at least one basis upon which fees could be awarded — a finding

of bad faith. One of the three grounds on which the Panel based its attorney's fees award was the "bad faith exception" to the American Rule. In relying on that legal basis, the Panel cited specifically to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) and *Dean Witter Reynolds, Inc. v. Bork*, No. 91-0392, 1991 U.S. Dist. LEXIS 11907 (E.D. Pa. Aug. 20, 1991). These two decisions recognize that arbitrators have the power to award attorney's fees as a means to protect the integrity of the arbitration process.

Petitioners do not dispute that the "bad faith exception" to the American Rule is a proper source of authority for the arbitrators to grant fees. (Petitioners' Eleventh Circuit Br. at p. 24). They have never argued, nor can they, that the Panel exceeded its powers by relying on the bad faith exception. They simply disagree with the Panel's determination under that authority.

This concession ends the analysis. A panel either has the power to make a ruling or it lacks the power. Where, as here, a party concedes that the panel was executing authority it rightfully possessed, there can be no claim for vacatur under Section 10(a)(4) of the FAA. This is true even if the arbitrators improperly interpreted or misapplied the law. *J.A. Jones Construction Co. v. Flakt, Inc.*, 731 F. Supp. 1061, 1064 (N.D. Ga. 1990) (arbitrators do not "exceed their powers" by making a decision contrary to law, but rather only if "they rule on matters outside of their proper consideration.")

The Court of Appeals also correctly found that the parties submitted the issue of attorney's fees to the Panel by agreement. (Appendix to Petition, p. 4a). Where the parties jointly submit the issue of attorney's fees and expenses for decision by an arbitration panel, this submission constitutes an enforceable *bilateral agreement* which allows the panel to award such fees. *E.g.*, *Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F. Supp. 86 (S.D.N.Y. 1990). An agreement to arbitrate "vests the arbitrators

with powers as broad as the agreement explicitly or implicitly provides." *Reyes Compania Naviera S. A. v. Manumante S. A.*, 649 F. Supp. 789, 791 (S.D.N.Y. 1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrators can decide age discrimination claim).

Once the parties decide to arbitrate, they can submit any issue they desire for a ruling. "[I]t is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration." *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982). If a party voluntarily submits an issue to arbitration, that party cannot later argue the arbitrator lacked authority to resolve the dispute just because he is displeased with the outcome. *International Longshoremen's Ass'n, AFL-CIO v. Hanjin Container Lines, Ltd.*, 727 F. Supp. 818, 821 (S.D.N.Y. 1989).

Here, the parties in their individual pleadings and in a Joint Scheduling Order expressly requested the Panel to award attorney's fees and expenses as part of its final judgment. (R1-5). Respondents' counterclaim requested fees on the grounds that the "allegations contained in the Statement of Claims are substantially without justification, frivolous, lack a factual or legal basis and, on information and belief, were asserted in bad faith." *Id.* No objection to the counterclaim was lodged. Shortly after the arbitration began, Respondents filed an Amended Counterclaim pursuant to an Order of the Panel. The Amended Counterclaim asserted a claim for attorney's fees detailing in 10 pages the misconduct which justified such an award. (R1-5). Moreover, at the time the Amended Counterclaim was filed, the Chairman stated that the Panel would hear it, adding, "Is that agreeable to all the parties?" Petitioners' counsel, Mr. Sumner replied, "So stipulated." (R1-5, Tr. at 380).

These various submissions reflect the parties' intent to authorize the Panel to award attorney's fees and expenses. No party

objected to the Panel's authority or jurisdiction to decide fee requests. The case of *Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F. Supp. 86 (S.D.N.Y. 1990) is on point. In that case, the parties each had included a prayer for costs and attorney's fees in their pleadings. The Court of Appeals held that these requests constituted a bilateral agreement to arbitrate the attorney's fee dispute and, therefore, upheld the grant of fees by the Panel. *Id.* at 92. *Accord, First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105, 112 (S.D.N.Y. 1994); *Teamsters Local Union No. 764 v. J. H. Merritt & Co.*, 770 F.2d 40 (3d Cir. 1985) (and other authorities cited to the Court of Appeals).

Further, although Petitioners argue that attorneys fees may be awarded "only when the contract expressly *includes* an express authorization," citing *Matter of Prudential-Bache Sec., Inc. and Depew*, 814 F. Supp. 1081, 1084 (M.D. Fla. 1993) (emphasis in original), this position is plainly contradicted by decisions of this and other courts. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that arbitrators may award punitive damages under arbitration agreement providing simply that "any controversy" is subject to arbitration); *Ierna v. Arthur Murray Int'l*, 833 F.2d 1472, 1476-77 (11th Cir. 1987) (upholding award of attorney's fees by arbitrators and noting "Courts are not to vacate arbitral awards except in the rare instances when the arbitrators . . . exceed a specific contractual *limitation* on the scope of their authority") (emphasis added); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996). Further, this Court has mandated that any doubts about coverage of a particular dispute should be resolved in favor of arbitration. *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Thus, a contract must contain an express *limitation* on an arbitrator's authority to award attorney's fees before that power is taken from them.

The Court of Appeals was correct in holding that the arbitrators had the power to make the award of attorney's fees.

III.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE AWARD OF ATTORNEY'S FEES WAS NOT ARBITRARY AND CAPRICIOUS.

The Panel entered a unanimous award of attorney's fees and expenses after hearing the evidence and considering hundreds of pages of briefs from the parties. Petitioners challenge the award claiming, under a narrow, judicially-created ground that, despite the Panel's careful consideration of the case, the award nevertheless was "arbitrary and capricious." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) (recognizing arbitrary and capricious standard but finding it was not satisfied even where court knew that the panel misinterpreted a Florida statute). Unfortunately, parties often use recognized grounds to vacate an arbitration award "as a ruse to obtain judicial review on the merits of an arbitral award." *Flender Corp. v. Techna-Quip, Co.*, 953 F.2d 273, 278 (7th Cir. 1992).

An award may be found "arbitrary and capricious" only if "a ground for the arbitrator's decision can[not] be inferred from the facts of the case." *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) (citations omitted); *O.R. Securities, Inc. v. Professional Planning Assoc., Inc.*, 857 F.2d 742, 746 (11th Cir. 1988) (award should be confirmed where any colorable justification supports it). To establish that an award is arbitrary and capricious, "[t]he onus . . . upon the party requesting the vacatur to refute . . . every rational basis upon which the arbitrator could have relied." *Robbins v. Day*, 954 F.2d at 684.

This is an extremely high standard. For example, an appeal from a judicial finding of bad faith cannot be overturned unless "clearly erroneous". *Perichak v. International Union of Elec. Radio and Mach. Workers*, 715 F.2d 78, 79 (3d Cir. 1983) ("finding of

'bad faith' . . . in a particular case is a factual determination and may be reversed only if it is clearly erroneous"). But an even higher hurdle faces a party challenging an arbitral award of attorney's fees. Identification of facts that tend to undermine the ruling is insufficient — a party challenging a panel's conclusion bears the burden of proving that the arbitrators' reasoning was so "palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores v. American Bakery and Confectionery Workers Int'l Union, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968); *Advest, Inc. v. McCarthy*, 914 F.2d at 8. *Compare Ainsworth v. Skurnick*, 909 F.2d 456, 462 (11th Cir. 1990) (vacating award where violation of Florida's Blue Sky Law was the "only reasonable conclusion to be drawn from the facts".)

Petitioners failed to meet this burden. Although Petitioners point to isolated instances which they claim support the Panel's belief in the merits of their claims, this fails to meet the test. It is obvious from the Panel's grant of Respondents' Motion to Dismiss that they believed Petitioners case had *no* merit. Further, the Panel decided to award attorney's fees based on their first-hand review of the evidence submitted and their own observations of the Petitioners' conduct. In deciding to award fees, the Panel considered this evidence as well as facts showing Petitioners *knew* their claims lacked merit before they brought them. Indeed, the arbitration record, fairly construed, revealed that Petitioners had filed an opportunistic arbitration claim in bad faith, hoping to use the high cost of defense as a weapon to extort from Respondents a favorable and undeserved settlement. Both the District Court and the Court of Appeals properly deferred to the arbitrator's decision in this case, relying upon the extensive record which supported the arbitrators' finding. (Appendix to Petition, p. 4a).

Moreover, the lower courts correctly upheld the award of attorney's fees jointly and severally against Petitioners since Petitioners made no effort to distinguish among themselves in their

claims and not one defendant stepped forward to disavow the tactics being pursued in the arbitration. The lower courts found sufficient support in the arbitration record for such a joint and several award, as explained by the District Court:

> The panel concluded that each and every defendant had failed to adduce any evidence in support of any of their claims. The panel appears to have concluded as had been suggested to it by plaintiffs, that the defendants were joint venturers in what the panel concluded was frivolous, bad faith litigation that had been pursued for an improper purpose from the start. The Court will not now second-guess the judgment of the panel under the guise of a determination that the panel's action was "arbitrary and capricious."

(Appendix to Petition, p. 24a).

Further, courts have found no fault with such "lump sum" awards. *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co.*, 960 F.2d 564, 567 (5th Cir. 1992) (awarding lump sum attorney's fees against multiple plaintiffs); *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D. Md. 1985) (assessing attorney's fees jointly and severally against parties); *Robbins v. Day*, 954 F.2d at 684 ("[A]n arbitration award that only contains a lump sum award is presumed to be correct").

Accordingly, the Court of Appeals correctly found that the Panel's attorney's fee award was not arbitrary and capricious.

IV.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE ARBITRATORS WERE NOT GUILTY OF MISCONDUCT IN FAILING TO GRANT PETITIONERS AN ADDITIONAL ADJOURNMENT.

It is well-settled that arbitrators enjoy wide latitude in conducting arbitration hearings and broad discretion in deciding procedural questions such as whether to grant or deny requests for a postponement. *Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir. 1991); *Robbins v. Day*, 954 F.2d at 685. Vacatur of an award for refusing to hear evidence is rare. *A.G. Edwards & Sons, Inc. v. McCullough*, 764 F. Supp. 1365 (D. Ariz. 1991), *reversed on other grounds*, 967 F.2d 1401 (9th Cir. 1992). Before a challenge on that basis can be sustained, a party must show that the arbitrators' refusal to hear evidence or postpone a hearing was without any reasonable basis and it so affected the rights of the party as to deprive them of a fair hearing. *National Post Office v. United States Postal Service*, 751 F.2d 834, 841 (6th Cir. 1985); *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1318 (S.D.N.Y. 1988).

It is beyond question that Petitioners had a full and fair opportunity to present their arguments and evidence. The Panel permitted Petitioners to present 19 witnesses over 58 hearing sessions. Further, Petitioners fully briefed their claims on Respondents' motion to dismiss, without once contesting the Panel's denial of their adjournment request. Indeed, to this day they have never made an offer of proof of the evidence they contend they were denied from presenting.

Under these facts, it can hardly be argued that other claimants would be discouraged from arbitrating because they believe they would not be given adequate time or opportunity to present their case, as Petitioners suggest.

CONCLUSION

For the reasons given above, certiorari should not be granted.

Respectfully submitted,

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